Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1012

FRIBESCO S.A. and OTELLO MANTOVANI,

Petitioners,

against

MITSUI & CO. (U.S.A.), INC., FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE S.A., R. PAGNAN & F.LLI, LOUIS DREYFUS CORPORATION and TRADAX OVERSEAS, S.A.,

Respondents.

BRIEF OF RESPONDENT LOUIS DREYFUS CORPORATION IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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Introductory Statement

Fribesco, S.A. ("Fribesco"), and Otello Mantovani ("Mantovani"), have petitioned this Court for writs of certiorari to review orders entered on June 2, 1977, by the Appellate Division, First Department of the Supreme Court of the State of New York. The order issued by the Appellate Division affirmed without alteration the opinion, dated October 6, 1976, of the Supreme Court of the State of New York, New York County, Special Term, Part I (Stecher, J.). That opinion was dispositive of four pro-

ceedings, which have since been consolidated for purposes of appeal; Louis Dreyfus Corporation ("Dreyfus"), was a respondent in one of those original proceedings.

An attempt by Fribesco to appeal the ruling of the Appellate Division ended on October 18, 1977, when the Court of Appeals of the State of New York denied leave to appeal. Petitioner now seeks to appeal the ruling of the Appellate Division to this Court pursuant to 28 U.S.C. § 1257(3). For the reasons set forth below, it is the position of Dreyfus that this controversy does not present grounds for this Court's jurisdiction under 28 U.S.C. § 1257(3), and that Fribesco's petition for a Writ of Certiorari to issue from this Court should therefore be denied.

Questions Presented

1. Does the instant controversy among the parties present any overriding issues of public policy which should be resolved in a judicial forum rather than the arbitral forum originally bargained for?

The Court below held "no".

2. Can the Grain Arbitration Rules of the American Arbitration Association be characterized as giving the appearance of bias merely because arbitrators are chosen on the basis of their experience in a particular trade?

The Court below held "no".

3. Did appellant show any potential bias on the part of potential arbitrators which would justify judicial appointment of panel members as opposed to the previously agreed upon method of selection of panel members pursuant to the Grain Arbitration Rules of the American Arbitration Association?

The Court below held "no".

Statutes and Regulations Construed

CPLR 7511(b)(1)(ii)—Civil Practice Law and Rules of the State of New York.

The Facts

The facts surrounding this controversy are simple. On November 19, 1974, Dreyfus, as Seller, and Pagnan, as Buyer, entered into a contract for the sale of 25,000 long tons of No. 3 U.S. yellow corn to be delivered for delivery in May of 1975 at a United States port on the Gulf of Mexico. The contract expressly incorporated by reference the standard North American Grain Association No. 2 Contract ("NAEGA 2"), essentially a Free On Board (F.O.B.) contract in which the Seller, Dreyfus, agreed to deliver the commodity at a U.S. Gulf port to be loaded on a vessel provided by the Buyer, Pagnan.

On that same date, Pagnan, as Seller, and Fribesco, as Buyer, entered into a contract on virtually identical terms, the only difference being the sale price. Both of the above contracts contained identical provisions relating to the quality of the commodity and the method of resolving disputes. Regarding quality, both contracts stated as follows:

> ". . . Quality and condition final at loading as per Official Inspection Certificate."

Official Inspection Certificates for commodities such as the one here are issued under authority of the Department of Agriculture pursuant to the United States Grain Standards Act, 7 U.S.C. § 71 et seq.

Since both contracts incorporated the NAEGA 2 contract by reference, they also included the NAEGA 2 provision which calls for resolution of disputes through arbitration ". . . in the City of New York before the

American Arbitration Association . . . pursuant to the Grain Arbitration Rules . . .". The parties further recognized that the laws of the State of New York would govern the interpretation of the contract, and consented to the jurisdiction of the New York courts.

At Fribesco's direction, the MOSGULF steamed into Destrehan, Louisiana on July 10, 1975, allegedly prepared to load the cargo under the contract. On that date, Dreyfus was prepared to fulfill its obligations, having purchased 25,000 tons of corn from Archer Daniels Midland (ADM), another grain company.

Arriving at Destrehan coincidentally with the MOSGULF were a Mr. Sanchez and a Mr. Kelleher. At that time, Mr. Sanchez was managing director of Sosimage (Fribesco's purchaser and believed to be a parent company or alter ego of Fribesco); Mr. Kelleher was an attorney associated with the law firm currently representing Fribesco in this dispute. Why Fribesco thought it necessary to have an attorney accompany a vessel supposedly intent on fulfilling its contract is a question which Fribesco can best answer.

When the MOSGULF arrived at the St. Charles Elevator, where it was to pick up the subject cargo, representatives of Fribesco demanded that the corn be sampled and inspected at the loading spout. In reply to that request, ADM, which operated the St. Charles Elevator, explained that the Official Inspection point approved by the Department of Agriculture for that elevator was in the "head house", not the loading spout, and consequently stated that if the vessel were to be loaded, the officially sanctioned inspection and sampling method would have to be used.

Disingenuously, Fribesco claimed that this inability to inspect at the spout expressly breached the contract provisions relating to inspection, and refused to allow the

MOSGULF to be loaded. On August 26, 1975, Dreyfus demanded arbitration with Pagnan, pursuant to their contract, for alleged breach, i.e. Fribesco's failure to take delivery of the contract quantity for Pagnan's account. In turn, on September 2, 1975, Pagnan demanded arbitration with appellant Fribesco, pursuant to their contract, for the selfsame failure to take delivery.

On September 22, 1975, Fribesco sent a reply to Pagnan denying the arbitrability of the dispute; it sent a similar reply to Dreyfus on September 30, 1975. Rather than live up to its previous agreement to arbitrate disputes, Fribesco, on November 26, 1975, moved in Supreme Court of New York, County of New York, to stay the duly demanded arbitration.

Fribesco sought to stay the demanded arbitration on two grounds; (1) that the controversy could not be submitted to an arbitration panel since it involved questions of public policy, namely, whether certain Department of Agriculture regulations relating to grain inspection were at variance with the United States Grain Standards Act, 7 U.S.C. § 71 et seq.; and (2) that the arbitration panel should be disqualified prior to the hearing because the Grain Arbitration Rules of the American Arbitration Association somehow contain an institutional bias against parties such as Fribesco.

The trial court disposed of the public policy argument of Fribesco in short order, as can be seen from the following language in the court's opinion (A2):

> "Fribesco does not seriously contest that there is a valid arbitration agreement between itself and petitioner. Rather, the thrust of its argument is that the dispute involves a public policy question. The argument is without merit. Whether the principles underlying the United States grain standards Act (7 U.S.C. § 71, et seq.) are being carried out by the Department of Agriculture is not an issue before this Court. Here,

there is a straight forward contract of sale containing a broad arbitration provision. Petitioner seeks to invoke that clause and is entitled to do so."

Fribesco's arguments as to the alleged partiality of the arbitration panel were likewise rejected by the court, as can be seen from the following:

". . . The panel from which the arbitrators are to be selected is composed of employees of the major grain traders and brokers in the grain trade, for the obvious purpose of providing expertise in a highly specialized field. It is Fribesco's argument that practically every member of the panel would be subject to challenge because of the substantial business dealings engaged in between the employers of the panel members and parties adverse to this proceeding. To the extent that the attack is on individual panel members, it is at best premature. The rules of the American Arbitration Association (Art. V Sec. 11), which by the parties' contracts govern the resolution of their disputes, provide for a disclosure and challenge procedure. To the extent that it is the panel itself which is challenged, the challenge is to a provision of the parties' own contracts with which the court will not at this stage interfere (cf. CPLR 7511(b)(1) (ii)). They have made their contract and the court will enforce it (Matter of Astoria Medical Group v. Health Ins. Co., 11 N.Y. 2d 128)."

The Appellate Division, First Department, affirmed, adopting the language of the trial court's opinion. Its motion for leave to appeal to the Court of Appeals of the State of New York having been denied, Fribesco now seeks to have this Court review the decision of the Appellate Division. For the reasons set forth below, we respectfully submit that this Court does not have jurisdiction to review the ruling of the Appellate Division, and that Fribesco's petition for a Writ of Certiorari should consequently be denied.

ARGUMENT

28 U.S.C. § 1257(3) does not give this Court jurisdiction to review this controversy.

In its petition for a Writ of Certiorari, Fribesco has cited 28 U.S.C. § 1257(3) as the basis for the jurisdiction of this Court. That statute refers to review by this Court of decisions of the highest State courts, and reads in relevant part as follows:

"§ 1257. *State courts; appeal; certiorari*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

Thus, it is apparent that a Federal question is a prerequisite to this Court's jurisdiction, whether that question is raised in connection with a Federal or State enactment.

This principle has long been upheld by this Court. For example, in *Durley* v. *Mayo,* 351 U.S. 277, 100 L.Ed. 1178, 76 S. Ct. 806, rehearing denied, 352 U.S. 859, 1 L. Ed. 2d 69, 77 S. Ct. 22 (1956), this Court stated:

"It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the

> State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U.S. 14, 18, 57 S.Ct. 350, 352, 81 L.Ed. 476; Lynch v. [People of] New York [ex rel. Pierson], 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. Klinger v. [State of] Missouri, 13 Wall. 257, 263, 20 L.Ed. 635; [Walter A.] Wood Mowing & Reaping Machine Co. v. Skinner, 139 U.S. 293, 297, 11 S.Ct. 528, 530, 35 L.Ed. 193; Allen v. Arguimbau, 198 U.S. 149, 154-155, 25 S.Ct. 622, 624, 49 L.Ed. 990; Lynch v. [People of] New York [ex rel. Pierson], supra." —76 S.Ct. at 809.

Moreover, ". . . where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Stembridge* v. *State of Georgia*, 343 U.S. 541, 547, 72 S.Ct. 834, 837, 96 L.Ed. 1130 (1952). Even a cursory examination of the court's opinion below shows that this matter was decided purely on the basis of New York State law.

The trial court soundly rejected Fribesco's frivolous attempt to bring the United States Grain Standards Act, 7 U.S.C. § 71 et seq., within the scope of this simple contract dispute. In rejecting Fribesco's argument, the trial court cited *National Equipment Rental Ltd.* v. *American Pecco Corp.*, 35 A.D. 2d 132, 314 N.Y.S. 2d 838, aff'd 28 N.Y. 2d 639, 320 N.Y.S. 2d 248, 269 N.E. 2d 37 (1970), in which the court stated:

> "It is immaterial that the buyer . . . contends that the failure to perform properly also entails a violation of law. Otherwise, it would be a rare arbitration agreement that could not be nullified merely by the contention of illegality in performance . . . It suffices that the agreement was lawful and called for lawful performance . . ."

Thus, the trial court applied New York law in ordering Fribesco to proceed to arbitration in New York, and no Federal question was either raised or resolved by the Court. Turning to the Grain Act itself, there is no language in that Act allowing the assertion of an exclusive cause of action for breach of a sales contract because of a violation of any of its provisions as to sampling. Conversely, there is no granted remedy whereby a buyer would be allowed to assert a claim for damages against his seller because of a violation of its sections as to sampling.

Moreover, if Fribesco were sincerely interested in resolving its contention with the Department of Agriculture, its remedies do not lie within the scope of the contract. First, § 7(c) of the United States Grain Standards Act, 7 U.S.C. § 79(e) states that ". . . the regulations prescribed by the Secretary [of Agriculture] under this Act shall include provisions for reinspections and appeal inspections . . .". Section 26.45 et seq. of the regulations under the Act set forth the procedure for obtaining an appeal inspection. Of course, Fribesco here did not even obtain an initial inspection, much less attempt to obtain an appeal inspection. Rather, it refused delivery on the basis of a hypothetical defect in the regulations, without ever condescending even to examine the commodity itself.

Second, if the case against the validity of the regulation is as damning as Fribesco maintains, it could have brought an action against the Department of Agriculture for an injunction and declaratory judgment pursuant to the Administrative Procedure Act, 5 U.S.C. § 701(a), since they are persons "aggrieved by agency action within the meaning of the relevant statute" as those words are used in 5 U.S.C. § 702. *Barlow* v. *Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L. Ed 2d 192 (1970). The relevant statute, the United

States Grain Standards Act, contains no prohibition against judicial review. Therefore, Fribesco has long had the opportunity to challenge the suspect regulation in court, if it sincerely wished to do so.

Lastly, the recent ruling of the New York Court of Appeals in *Siegel* v. *Lewis,* 40 N.Y. 2d 687, 389 N.Y.S. 2d 800 (1976) buttresses Judge Stecher's finding below that ". . . [t]o the extent the attack is on individual panel members, it is at best premature." Slip opinion at 4. There, a disputed stock purchase agreement contained a clause providing for arbitration by the lawyer and accountant who had actually prepared the agreement between the parties. Petitioner, like the appellant here, sought to disqualify the arbitrators before the commencement of proceedings in view of their previous relationship with both the transaction and the respondent. The Court of Appeals rejected that argument on the grounds that there had been no failure to disclose such interrelationships as existed, and ordered the parties to arbitration:

> "assent by a party to the choice of an arbitrator in the face of that party's knowledge of a relationship between the other side and the arbitrator is a waiver of his right to object. And, '[s]ince waiver is a matter of intention * * * the touchstone * * * is the knowledge, actual or constructive in the complaining party of the tainted relationship or interest of the arbitrator' (*Matter of Milliken Woolens* [*Weber Knit Sportswear*], 11 A.D.2d 166, 168-169, 202 N.Y.S. 2d 431, 434, affd., 9 N.Y. 2d 878, 216 N.Y.S. 2d 696, 175 N.E.2d 826; see, also, Domke, Commercial Arbitration, § 21.04)."
>
> —389 N.Y.S. 2d at 802

In view of its previous NAEGA 2 contracts, the petitioner here is certainly chargeable with at least constructive notice of the Grain Arbitration Rules.

In addition, the *Siegel* court addressed the issue of when is the proper time to challenge the appointment of an arbitrator:

> "Significantly, our statutes, which provide specifically for the enforcement of private arbitration agreements and for the vacatur or modification of awards improperly made, are completely silent on any power to disqualify arbitrators in advance of arbitration proceedings (CPLR art. 75). It is only when an arbitrator cannot act for reasons of health or unavailability or other circumstances tantamount to the occurrence of a vacancy that there is statutory authorization for a court to appoint a replacement" (CPLR 7504).
>
> —389 N.Y.S. at 801

No such allegations were made by petitioner here. Thus, the lower Court was correct in characterizing the application to disqualify as "premature", especially since the CPLR provides adequate forms of protection. As the *Siegel* court observed:

> " 'In the absence of a real possibility that injustice will result, the courts of this State will not rewrite the contract for the parties (see *Matter of Lipschutz* [*Gutwirth*], 304 N.Y. 58, 64, 106 N.E.2d 8)' (50 A.D. 2d 858, 859, 376 N.Y.S.2d 614, 617). Needless to say, if the arbitrators, in the actual execution of their office, prove to have been unfair or unfaithful to their obligations, their award is not impervious to judicial action (CPLR 7506, subd. [a]; 7511, subd. [b]; see *Matter of American Eagle Ins. Co.* v. *Jersey,* 240 N.Y. 398, 405, 148 N.E. 562, 564). We therefore conclude that there is no basis for advance disqualifications of the arbitrators."
>
> —389 N.Y.S. 2d at 803

As authority for rejecting Fribesco's challenge to the arbitration panel, the trial court cited CPLR 7511(b)(1)

(ii), of the Civil Practice Law and Rules of the State of New York.

From the foregoing, it is apparent not only that the court below had adequate grounds for disposing of this matter purely on the basis of New York State law, but also that the court did in fact resolve this matter purely on the basis of the laws of the State of NewYork. Therefore, this matter does not raise the Federal question necessary to invoke this Court's jurisdiction under 28 U.S.C. § 1257(3) et seq. As a result, Fribesco's petition that this Court issue a Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, Fribesco's petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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